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In the Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ET AL., PETITIONERS

v.

RAY THORNTON, ET AL.

WINSTON BRYANT, ATTORNEY GENERAL OF ARKANSAS, PETITIONER

v.

BOBBIE E. HILL, ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Amendment 73 to the Arkansas Constitution, which provides that a person who has served three or more terms as a Member of the United States House of Representatives, or two or more terms as a Member of the United States Senate, can never again have his or her name placed on the ballot for that office, contravenes Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3, of the United States Constitution.

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INTEREST OF THE UNITED STATES

This case involves the interpretation of federal constitutional provisions that address the composition of the national legislature. The provision under challenge, Amendment 73 to the Arkansas Constitution, attempts to impose term limits on the service of Members of the United States House of Representatives and United States Senate by prohibiting the names of long-term incumbent Members from appearing on the ballot. Amendment 73 is inconsistent with the structure of the federal system in that it effectively makes eligibility for membership in the Con-

gress dependent on regulation by a State. Amendment 73 also impairs the right of voters freely to choose their federal representatives. For these reasons, the United States has a substantial interest in this case.

STATEMENT

1. On November 3, 1992, the electorate of Arkansas approved an initiative adopting Amendment 73 to the Arkansas Constitution. Pet. App. 1a.[1] The Amendment's preamble provides as follows:

> The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of the elected officials.

Id. at 3a-4a. To "limit the terms" of Arkansas' congressional delegation, Amendment 73 prohibits long-term incumbents from gaining a place on the election ballot. The Amendment specifically provides that any person who has been elected to three or more terms as a Member of the United States House of Representatives from Arkansas may not thereafter be "certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to" the House. *Id.* at 4a. It imposes an analogous restriction on candidates for the United States Senate who have been elected to two or more terms from Arkansas. *Id.* at 5a.

2. On November 13, 1992, respondent Bobbie E. Hill, on behalf of herself and the League of Women Voters of Arkansas, commenced this action for declaratory relief in the Circuit Court of Pulaski County, Arkansas. Pet.

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[1] All references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari in No. 93-1456.

App. 5a. The complaint alleged that Amendment 73 is invalid under Article I, Article IV, the First Amendment and the Fourteenth Amendment of the United States Constitution, because of the restrictions that it imposes on Arkansas' congressional delegation. *Id.* at 5a-6a.

On September 8, 1993, the circuit court entered a final order resolving the parties' cross-motions for summary judgment, Pet. App. 53a-62a, incorporating conclusions of law that the court had entered on July 29, 1993, *id.* at 45a-52a. The court held that Amendment 73 was adopted in violation of Arkansas law, and that the Amendment was also invalid under the Qualifications Clauses of the United States Constitution, Art. I, § 2, Cl. 2, and Art. I, § 3, Cl. 3. Pet. App. 46a-49a, 53a-60a.[2]

3. The Supreme Court of Arkansas, by a divided vote, affirmed in part and reversed in part. Pet. App. 1a-43a. The court unanimously reversed the circuit court's holding that Amendment 73 had not been adopted in accordance with state law. By a vote of 5-2, however, the court held that the provisions of Amendment 73 governing congressional incumbents violated the Qualifications Clauses.[3]

A plurality of three justices, relying on the historical background of the Qualifications Clauses and *Powell* v. *McCormack*, 395 U.S. 486 (1969), concluded that the age, citizenship, and residency requirements set forth in Article I are the exclusive qualifications for congressional service. Pet. App. 12a-13a. The plurality also determined that Amendment 73 could not be upheld as an exercise of the State's power under the Elections Clause, Art. I, § 4, Cl. 1, because "[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents

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[2] The court rejected respondents' claims that Amendment 73 violated Article IV of the Constitution and the First and Fourteenth Amendments. Pet. App. 59a, 60a.

[3] The court held that Amendment 73 was valid in all other respects.

from further service." Pet. App. 14a-15a. The plurality further concluded that the Amendment could not be upheld as an exercise of power reserved to the States by the Tenth Amendment because the Qualifications Clauses "fix the sole requirements for congressional service." *Id.* at 15a.

Justices Dudley and Brown concurred in the plurality's determination that Amendment 73 violates the Qualifications Clauses. Pet. App. 26a-27a, 41a-42a. Justices Hays and Cracraft dissented. *Id.* at 33a-35a, 37a-39a.

SUMMARY OF ARGUMENT

I. The Constitution specifies three qualifications for membership in the Congress—a minimum age, United States citizenship for a minimum number of years, and inhabitancy of the State of election. A review of the debates at the Constitutional Convention and the state ratifying conventions reveals that the Framers intended to preclude Congress from adding to this list of qualifications. See *Powell* v. *McCormack*, 395 U.S. 486, 532-541 (1969).

II. Petitioners' contention that the Framers denied Congress the power to add membership qualifications to those specified in the Constitution, but did not deny the same power to the States, is contrary to the Framers' design. The Framers believed that the fundamental defect of the Articles of Confederation was the failure to establish a direct and immediate relationship between the national government and the people. To ensure that the people would remain connected to the union and devoted to its success, the Framers provided for direct election of Representatives on a biennial basis. By fixing the qualifications for congressional service in the Constitution, the Framers prevented state legislatures from altering the popular character of the House by manipulating its membership. The term limits imposed by Amendment 73 would thus interfere with the people's right freely to elect their Representatives, secured by Article I, Section 2,

Clause 2, and their Senators, secured by the Seventeenth Amendment.

III. Petitioners contend that Amendment 73 may be upheld as a valid exercise of state power under the Elections Clause, Art. I, § 4, Cl. 1, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." The primary purpose of the Elections Clause, however, was to restrict state power, because the Framers were concerned that the States might use election powers to subvert the national government. The Elections Clause authorizes States to impose general ground rules to preserve the integrity of the electoral process, but Amendment 73 is not such a rule. Its aim and effect are to prevent a specific class of individuals (long-term incumbents) from winning elections. Moreover, because the Elections Clause grants Congress a power coextensive with that of the States, petitioners' theory would effectively give Congress the power to impose qualifications on its Members, even though the Framers specifically deprived Congress of that power. Petitioners' argument that Amendment 73 is not a qualification because it theoretically permits the write-in election of persons excluded from the ballot is not persuasive, because the unquestioned intent and virtually certain effect of Amendment 73 are to prevent the reelection of the incumbents excluded from the ballot.

IV. The Tenth Amendment also provides no authority for States to impose congressional term limits. If the Qualifications Clauses established an exclusive list of requirements for congressional service and deprived the States of the power to add any other qualifications, then the Tenth Amendment cannot authorize the States to add to this list. Moreover, because the Congress did not exist prior to the ratification of the Constitution and the creation

of the federal government, the States can have no "reserved" power to regulate congressional elections.

ARGUMENT

AMENDMENT 73 ADDS TO THE QUALIFICATIONS FOR CONGRESSIONAL SERVICE SET FORTH IN THE CONSTITUTION AND IS THEREFORE INVALID

Neither the United States Congress, nor either of its Houses, can constitutionally impose term limits upon Senators or Representatives by restricting membership in either House to persons who have not already served a certain number of terms. In *Powell* v. *McCormack*, 395 U.S. 486, 522 (1969), the Court held that the Houses of Congress are "without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in [Article I, Section 2, Clause 2, or Article I, Section 3, Clause 3, of] the Constitution." (Emphasis omitted.) A term-limits provision that disqualified any person from being seated in either House because of prior service would impermissibly impose qualifications of service beyond those set forth in Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3.

Petitioners contend, however, that a term-limits provision can nevertheless be constitutional if it is imposed by a State. Petitioners argue that Amendment 73 to the Arkansas Constitution is constitutional because (a) Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3, restrict only Congress's power, and not that of the States; (b) the States have the power, under the Elections Clause, Art. I, § 4, Cl. 1, to restrict incumbents' access to the ballot; (c) Amendment 73 leaves open the theoretical possibility that an incumbent may be reelected by write-in vote, and therefore does not impose a "qualification" in addition to those established in the Constitution; or (d) the Tenth Amendment reserves to the States the power to limit the length of service in Congress. Each

of these arguments is incorrect, and Amendment 73 is unconstitutional.

A. A Term-Limits Provision Would Be Unconstitutional If Imposed By Congress

As this Court held in *Powell*, the Constitutional Convention established three qualifications for membership in the Congress—age, citizenship, and inhabitancy of the State of election—and denied to Congress the power to add any further qualifications.[4] Among the additional qualifications considered and rejected by the Convention was a term-limits provision. The Virginia Plan, presented to the Convention on May 29, 1787, by Edmund Randolph, proposed several qualifications for membership in the "first branch" of a bicameral legislature, including an unspecified age qualification, the predecessor to the subsequently adopted clauses restricting service by Members of Congress in the Executive Branch (Art. I, § 6, Cl. 2), and a term-limits or rotation provision, which provided that the Members of the first branch would be "incapable of re-election" for an unspecified time after expiration of their term of service. 1 *The Records of the Federal Convention of 1787*, at 20 (Max Farrand ed., 1966 rev. ed.) [hereinafter Farrand]. The term-limits proposal was unanimously rejected by the Convention on June 12, before

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[4] The Constitution does contain other qualifications for service, such as the disqualification from federal office of persons convicted after impeachment (Art. I, § 3, Cl. 7), and the Incompatibility Clause, prohibiting simultaneous service in the federal Executive and Legislative Branches (Art. I, § 6, Cl. 2), as well as a disqualification added by the Fourteenth Amendment, prohibiting service by certain persons who had fought for the Confederacy (Amend. XIV, § 3). Since these disqualifications were carefully considered by the framers of the provisions and written into the Constitution, they do not suggest a general authority in either Congress or the States to impose additional qualifications. Indeed, they reinforce the point that the exclusive qualifications for office are found in the Constitution itself. See *Powell*, 395 U.S. at 520 n.41.

the plan of the Convention was submitted to the Committee of Detail. 1 *id.* at 217.

On the motion of George Mason, however, the Convention instructed the Committee of Detail to consider the propriety of additional qualifications for membership based on property ownership. 2 Farrand 121-125; *Powell*, 395 U.S. at 532-533. After considering that proposal, as well as another one to restrict membership in the Congress to those persons possessing the qualifications under state laws to be electors (such as sanity, previous residence in the State for a year, possession of real property, or enrollment in the state militia, 2 Farrand 139-140), the Committee reported a plan establishing age, citizenship, and residency qualifications for membership in both Houses, 2 *id.* at 178, 179, and authorizing the Congress to establish additional, uniform property qualifications for membership, 2 *id.* at 179. No other qualifications were reported out of the Committee.

The Convention debated the Qualifications Clauses on August 8, 9, and 10. On August 8, the Convention considered the Committee of Detail's proposal that every Member of the House and Senate must be "a resident of the State in which he shall be chosen." 2 Farrand 178, 179. Roger Sherman proposed that the word "resident" be replaced by the word "inhabitant," which was "less liable to misconstruction." 2 *id.* at 216. James Madison supported the change, pointing out that, in the Virginia legislature, there had been "[g]reat disputes" over the meaning of the word "resident." 2 *id.* at 217. Gouverneur Morris and John Francis Mercer, though opposing any residency requirement, made the same criticism of the term "resident." *Ibid.* Apparently, the defect of the word "resident," in the view of the Convention, was that it was a legal term, not self-defining but subject to construction by the States; Madison suggested, for example, that it might be construed to exclude "persons absent occasionally for a considerable time on public or private business." *Ibid.* Madison preferred a uniform requirement

of inhabitancy in the State at the time of election. The Convention apparently accepted this reasoning, for it unanimously replaced the term "resident" with "inhabitant." 2 *id.* at 218.[5]

The debates on August 10, which were extensively reviewed by the Court in *Powell*, led to the elimination of any additional qualifications for membership in Congress. "[O]n this critical day the Framers were facing and then rejecting the possibility that the legislature would have power to usurp the 'indisputable right [of the people] to return whom they thought proper' to the legislature." 395 U.S. at 535 (footnote omitted). The initial question before the Convention was whether to accept the Committee of Detail's proposal that the Congress be authorized to establish property qualifications for Members. Madison opposed any additional qualification for membership as contrary to republican government; he argued that granting the power to a legislature to regulate the qualifications of its own members could "subvert the Constitution" by undermining the people's right freely to elect their representatives. 2 Farrand 249-250. Gouverneur Morris countered by proposing "to leave the Legislature entirely at large" in enacting membership qualifications, not limited to property ownership, but Madison opposed that proposal even more strenuously, adverting to the British Parliament's abuses of the power to set its members'

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[5] The debates on August 8 are particularly relevant, for they suggest that the Convention was concerned with uniformity of qualifications, and not just the possibility that Congress might expand the list of qualifications (which was debated on August 10). The Convention's rejection of the word "resident" because the word could be variously defined by the States, in favor of the more self-defining word "inhabitant," supports the view that the Framers intended to forbid the States from adding qualifications, especially since the qualification of residency had been a contentious matter in the state legislatures. To contemporary ears, the word "inhabitant" may not sound much more self-defining than the word "resident," but the Convention plainly found a significant difference between the two terms.

qualifications. 2 *id.* at 250; see *Powell,* 395 U.S. at 535 & n.68.

The Convention rejected both Morris's proposed amendment, 2 Farrand 250, and the Committee's proposal for property qualifications, 2 *id.* at 251. The result, as the Court held in *Powell,* was that the qualifications for membership in the Congress were "defined and fixed in the Constitution, and [were made] unalterable by the legislature." 395 U.S. at 539 (quoting The Federalist No. 60, at 371 (Hamilton) (C. Rossiter ed. 1961)); see also 395 U.S. at 550 ("Therefore, we hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, *the House was without power* to exclude him from its membership.") (emphasis added).

B. The Qualifications Clauses Also Restrict The Power Of The States

There is no basis for petitioners' argument that the Constitution limited the power of Congress to add qualifications but did not similarly limit the power of the States. Such a power, if permitted to the States, would have fundamentally contravened the Framers' design by making service in the federal Congress dependent on regulation by the States. That power would have allowed the States to interfere with the direct and immediate relationship between the people and the union, on which the success of the federal government was thought to depend.

In the Framers' view, "the great and radical vice" of the Articles of Confederation was the "principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, at 108 (Hamilton). The Framers therefore discarded the confederal structure of the Articles for a national government that "extend[ed] the authority of the Union to the persons of the citizens—

the only proper objects of government." *Id.* at 109. But the Framers perceived that the state governments might attempt to subvert the connection between the people and the union, and so the question became one of how to ensure that "[t]he people of America [remain] warmly attached to the government of the Union, at times when the particular rulers of particular States * * * may be in a very opposite temper." The Federalist No. 59, at 365-366 (Hamilton).

To the Framers, the solution lay in the republican nature of the union, and, in particular, the popular character of the House of Representatives. As Madison observed, "the popular election of one branch of the national Legislature [was] essential to every plan of free Government," because, without direct elections, "the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt." 1 Farrand 49-50. The union could be "stable and durable" only if the legislature "should rest on the solid foundation of the people themselves," rather than an intervening electoral body, like the state legislatures. 1 *id.* at 50. Elections to the House would keep the people devoted to the success of the union, because its doors would be open "to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth." The Federalist No. 52, at 326 (Madison). Thus, the Framers required biennial elections to the House to ensure that the federal Congress would retain "an immediate dependence on, and an intimate sympathy with, the people." *Id.* at 327. They also prohibited the state legislatures from unduly burdening the right of suffrage in elections to the House, which might undermine the popular quality of the House that was crucial to the effectiveness of the federal government. See *id.* at 326 (permitting state legislatures to regulate suffrage for federal House "would have rendered too dependent on the State governments that branch of

the federal government which ought to be dependent on the people alone").

The debates on residency illustrate the Framers' distrust of state regulation of qualifications. As discussed *supra*, pp. 8-9, the Convention adopted a provision requiring that every Representative and Senator be an "inhabitant" of the State of election, and rejected the term "resident" as subject to state manipulation. Recognizing a state power to impose term limits would be inconsistent, not only with the Framers' general intent to preclude state interference with the right of the people to choose their federal representatives, but also with the Framers' specific resolution of the residency issue.[6]

In explaining the Convention's actions, Madison argued that the Convention had ensured the popular character of the House by guaranteeing to the people the right to elect anyone of their choosing to that chamber:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

The Federalist No. 57, at 351. Elaborating on this point, Hamilton refuted the argument that the House would become a tool of the "wealthy and the well-born" by

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[6] Although the Convention did not discuss state regulation of qualifications for federal office beyond residency, there is no doubt that the Framers were aware of the possibility that the States would try to regulate the qualifications for membership in the federal Congress. Madison noted this possibility when he observed that the Convention had fixed the qualifications for service in the Constitution, rendering such service immune from regulation by either Congress or the States: "The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention." The Federalist No. 52, at 326.

pointing out that there was "no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect *or be elected.*" The Federalist No. 60, at 370-371 (emphasis added). According to Hamilton, the Convention had made this abuse impossible, because "[t]he qualifications of the persons who may choose or be chosen * * * are defined and fixed in the Constitution, and are unalterable by the legislature." *Id.* at 371.[7] To the Framers, therefore, the fact that qualifications for service in the Congress were fixed by the Constitution ensured that the intended character of the Congress (especially the democratic character of the House) would be preserved.[8]

The Framers' decision to preclude term limits became a significant point of contention in the ratification debates.

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[7] Not only did this prohibition of further restrictive qualifications keep the House open to democratic impulses, but, in the Framers' view, it also safeguarded against the possibility that factions, supposedly more likely to be prevalent in state legislatures than in Congress, could capture the process of election to the House and use it to their advantage. See The Federalist No. 60, at 367-368 (Hamilton).

[8] There is less discussion in *The Federalist Papers* about qualifications for Senators. Because Senators were to be elected by the state legislatures, the danger that those legislatures could interfere with the people's choice of representatives did not apply to the Senate. With the adoption of the Seventeenth Amendment, however, the Framers' concerns about guaranteeing the people's right to elect their chosen representatives did become applicable to the Senate. Cf. *Smith* v. *Allwright*, 321 U.S. 649, 659-660 (1944); *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 227 (1986) ("fundamental principle of free electoral choice" was enshrined in Seventeenth Amendment). Moreover, the Framers did fix the qualifications for senatorial service in the Constitution, see Art. I, § 3, Cl. 3, and in doing so, they may have perceived a danger that a state legislature might otherwise try to restrict its successors' choice of Senators. As noted in the text, during the ratification debates, the Federalists opposed compulsory rotation of office for Senators on the grounds that it would deny to state legislatures the opportunity to reelect experienced and qualified Senators and would destabilize the Senate.

Anti-Federalists focused on the absence of compulsory rotation of office for Members of Congress as threatening to States and people alike, arguing that Members would remain permanently in office, detached from sentiment in the state legislatures and among the people in their home States.[9] Any understanding that the States would be able to impose a rotation requirement on either Representatives or Senators was absent from the ratification debate. In the New York ratifying convention, for example, where rotation of office was debated at length, both Melancton Smith and Gilbert Livingston identified rotation of Senators as a chief advantage of the Articles of Confederation over the new Constitution,[10] yet neither Robert Livingston nor Alexander Hamilton, the Constitution's principal defenders at that convention, even hinted that New York would retain the power, under the Constitution, to impose rotation on its representatives.

In fact, the Framers believed that compulsory rotation of office could undermine the effectiveness of the federal government, because (like excessively frequent elections, which they also opposed) compulsory rotation would prevent the federal representatives from developing expertise in the complex task of governing the nation. Madison remarked that "[a] few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and

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[9] See Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 521-522 (1969); 2 *The Complete Anti-Federalist* 283, 290-292, 444-445 (Herbert Storing ed. 1981) [hereinafter *Complete Anti-Federalist*] ("The Federal Farmer" and "Brutus" objecting to lack of rotation); 3 *id.* at 94 ("Letter by An Officer of the Late Continental Army"; same); 3 *id.* at 162-163 (published dissent of the minority at Pennsylvania ratifying convention; same); 4 *id.* at 275 ("Observations by a Columbian Patriot"; same).

[10] See 6 *Complete Anti-Federalist* 164-165; 2 *Debates on the Adoption of the Federal Constitution* 287 (J. Elliot ed., reprint 1987) (1888) [hereinafter *Elliot's Debates*].

perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them." The Federalist No. 53, at 335. Hamilton, at the New York convention, urged that compulsory rotation of office actually made representatives less accountable to the people, because the prospect of reelection kept them attuned to the will of the people, whereas "[w]hen a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument." 2 *Elliot's Debates* 320.

The principle to be drawn from the Convention and ratification debates, therefore, is that "[t]he right of the people to choose [their Members of Congress] * * * is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right." *United States* v. *Classic*, 313 U.S. 299, 314 (1941). Amendment 73 is unconstitutional because it impairs the right of the voters of Arkansas to elect candidates of their choice.

Because Amendment 73 was enacted by initiative rather than the Arkansas legislature, it may not appear to pose precisely the same threat to the relationship between the people and the union that the Framers feared. Petitioners do not contend, however, that Amendment 73 is constitutional merely because it was adopted by initiative rather than legislation. Moreover, the abridgment of the people's free choice of elected representatives, and the consequent threat to the connection between the people and the national government, are both present in this case. For example, the majority of voters in one (or more) Arkansas congressional districts may, in the future, wish to reelect their Representatives, but Amendment 73 would effectively prevent them from doing so. Amendment 73 would thus abridge the constitutional right of those Arkansas voters to choose their Members of Congress without regard to

any qualifications for federal office beyond those in the Qualifications Clauses. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736-737 (1964).[11]

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[11] Petitioner U.S. Term Limits suggests that the States imposed additional qualifications on Members of Congress at a very early stage. See Br. 25-27. As respondent Hill points out, this suggestion is a misleadingly incomplete description of the States' practices in the period immediately after the adoption of the Convention. But even if that assertion were correct as a factual matter, it would not be probative. Given that a key concern of the Framers was that the state legislatures would attempt to interfere with free elections to the federal Congress, actions by those very state legislatures are not reliable indicators of the Framers' intent. Indeed, the States' actions cited by petitioner U.S. Term Limits show that the Framers' fears were justified.

Moreover, decisions made by the federal House and Senate support the view that States may not add to the required qualifications of Members of Congress. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 398-401 (1989). One of the earliest controversies concerning the qualifications of Members-elect occurred in 1807, when the House of Representatives voted to seat William McCreery of Maryland, despite his alleged failure to satisfy certain residency requirements imposed by state law. 17 Annals of Cong. 1233, 1237 (1807). The House Committee on Elections issued a report stating that the Constitution did not "reserv[e] any authority to the State Legislatures to change, add to, or diminish" the qualifications set forth in the Constitution. *Id.* at 871. During the floor debates, the Chairman of the Committee, Rep. William Findley of Pennsylvania, similarly expressed the view that "neither the State nor the Federal Legislatures are vested with authority to add to" the qualifications set forth in the Constitution. *Id.* at 872. (Rep. Findlay had been an Anti-Federalist, and had issued the "Letter by An Officer of the Late Continental Army," referred to in note 9, *supra*, criticizing the Constitution for its failure to include a rotation provision. See Troy Andrew Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 14 n.72, 33 (1992).) See also 17 Annals of Cong. 894 (1807) (Rep. Rowan) ("No power had been given to the State sovereignties to superadd qualifications."); *id.* at 877-879 (Rep. Sturges); *id.* at 886 (Rep.

C. The Elections Clause Does Not Authorize The States To Impose Additional Qualifications Like Term Limits

Petitioners contend that Amendment 73 may be upheld as a valid exercise of state power under the Elections Clause, Art. I, § 4, Cl. 1, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." According to petitioners, Amendment 73 is merely a regulation of the "Manner" of holding elections for Congress. This argument is incorrect for several reasons.

First, the argument misperceives the fundamental purpose of the Elections Clause, which was designed primarily as a restriction of state power, not a grant of it. The Convention adopted the Elections Clause out of

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Joseph Clay); *id.* at 887 (Rep. Smilie); *id.* at 907-909 (Rep. Quincy); *id.* at 912-913 (Rep. Key); *id.* at 918-920 (Rep. Howard); *id.* at 928-929 (Rep. Desha). But see *id.* at 883-884 (Rep. Randolph); *id.* at 900-901 (Rep. Love); *id.* at 1237 (Rep. Barker).

In 1887, the Senate seated Charles Faulkner of West Virginia, despite a provision in the West Virginia Constitution that purported to render him ineligible to serve. See 139 Cong. Rec. S1146 (daily ed. Feb. 3, 1993) (statement of Sen. Mitchell). The Senate Committee on Privileges and Elections unanimously concluded that "no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States." S. Rep. No. 1, 50th Cong., 1st Sess. 4 (1887).

In 1964, the Senate seated Pierre Salinger, who had been appointed by the Governor of California to fill a vacancy upon the death of Senator Clair Engle, despite the fact that Salinger had not satisfied the requirement of a state statute that Senators be qualified as electors in California elections. See 139 Cong. Rec. S1146 (daily ed. Feb. 3, 1993) (statement of Sen. Mitchell). In its report recommending that Salinger be seated, the Senate Committee on Rules and Administration stated that "[i]t is well settled that the qualifications established by the U.S. Constitution for the office of U.S. Senator are exclusive, and a State cannot, by constitutional or statutory provisions, add to or enlarge upon those qualifications." S. Rep. No. 1381, 88th Cong., 2d Sess. 5 (1964).

concern that the States might attempt to undermine the federal government by impeding elections to the Congress; the Elections Clause ensured that Congress could preserve itself whenever such a threat appeared. The Convention did grant the States authority to regulate election procedures "in the first instance" (The Federalist No. 59, at 363 (Hamilton)), since state regulation of procedural matters "in ordinary cases, and when no improper views prevail," might be more convenient than federal regulation (*ibid.*). But the purpose of the clause was to deprive the state legislatures of the "exclusive power of regulating elections for the national government, * * * [which] would leave the existence of the Union entirely at their mercy." *Ibid.*

Second, there is no evidence that the Framers intended the Elections Clause to cover anything more than election *procedures*, such as "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, [or] sh[ould] all vote for all the representatives; or all in a district vote for a number allotted to the district." 2 Farrand 240 (Madison). Absent from the Convention or ratification debates is any suggestion that the Elections Clause empowered the state legislatures to exclude *classes* of persons from the ballot, or otherwise to restrict their ability to be elected. See 4 *Elliot's Debates* 71 (statement of Mr. Steele at North Carolina ratifying convention) ("[T]he power over the manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way."). Such an authority to exclude classes of persons would have given the States the power to impose "qualifications," a power that the Convention intended to deny them.

This Court has upheld the authority of the States, under the Elections Clause, to regulate election procedures, and to ensure an orderly and comprehensible ballot. The States have power to "maintain[] the integrity of the political process," *Storer* v. *Brown*, 415 U.S. 724, 731

(1974), and to ensure that "some sort of order, rather than chaos, is to accompany the democratic processes," *id.* at 730. Thus, even in federal elections, States may require that independent candidates "be clear of political party affiliations for a year before the primary," *id.* at 733, to assure the voters that independent candidates are legitimately independent. States also have broad authority under the Elections Clause to ensure the "protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley* v. *Holm,* 285 U.S. 355, 366 (1932); see also *Roudebush* v. *Hartke,* 405 U.S. 15, 25 (1972) (States may provide recount procedures in federal elections "to guard against irregularity and error in the tabulation of votes"); *Anderson* v. *Celebrezze,* 460 U.S. 780, 788 n.9 (1983) (States may impose "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself").

None of these decisions suggests, however, that the States may use their authority under the Elections Clause for the purpose of preventing the election of a class of persons, defined without reference to their support in the electoral process. Petitioners attempt to draw support from cases such as *Storer* v. *Brown, supra,* for that assertion, but the States' authority to channel the process by which any candidate can gain access to the ballot cannot be equated to a power to exclude a class of candidates from the ballot entirely. Completely incapacitating a group of persons, defined by their prior experience rather than their ability to attract voter support, from gaining access to the ballot is not an "evenhanded" regulation of "the electoral process itself."

The Court in *Storer* made exactly that point. While upholding California's power to use party primaries "to

winnow out and finally reject all but the chosen candidates," 415 U.S. at 735, thus preventing "sore losers" in the party primary from reappearing on the general election ballot as independent candidates, the Court emphasized that the party primary "involve[d] no discrimination" against true independents (*id.* at 733), who could gain access to the ballot by the circulation of ballot petitions. In rejecting a Qualifications Clause challenge to the "sore loser" law, the Court noted that California required only that "the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Id.* at 746 n.16. In other words, no candidate was prevented from *entering* the race to gain a spot on the general election ballot. That ballot was, instead, open to all candidates who demonstrated, by one or another method, that they had sufficient support to survive the "winnowing out" process.[12]

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[12] Some state "resign to run" statutes have withstood scrutiny under the Qualifications Clauses, but only where the State regulates the conduct of state officials while they choose to remain in state office. See *Joyner* v. *Mofford*, 706 F.2d 1523, 1528-1531 (9th Cir.), cert. denied, 464 U.S. 1002 (1983); *Signorelli* v. *Evans*, 637 F.2d 853, 858-863 (2d Cir. 1980); *Adams* v. *Supreme Court*, 502 F. Supp. 1282, 1291 (M.D. Pa. 1980); *Oklahoma State Election Bd.* v. *Coats*, 610 P.2d 776, 778-780 (Okla. 1980); *Alex* v. *County of Los Angeles*, 111 Cal. Rptr. 285, 293-294 (Ct. App. 1973); see also *State ex rel. Watson* v. *Cobb*, 2 Kan. 32, 58 (1863) (State "cannot interfere with the tenure of [federal] office," although it can declare state offices vacant when incumbent has been elected to federal office). The principle of these decisions is that the States have a legitimate interest in ensuring that their officeholders pay full attention to their state positions, and not simultaneously hold (or run for) other positions. Resign-to-run laws are intended as a qualification for service in the state office, not the federal Congress, and the would-be candidate can always avoid the bar by resigning the state position. Similarly, the Hatch Act, 5 U.S.C. 7323(a)(3) (Supp. V 1993), which prohibits federal employees from running as candidates or nominees for partisan political office (including the House and Senate), constitutes a regulation of the federal civil service, not the federal Congress,

Petitioners also overlook the fact that, if the Elections Clause gives the States the power to impose term limits, then it must give Congress the same power, since, under that clause, Congress "may at any time by Law make or alter" similar regulations. Art. I, § 4, Cl. 1. See *Smiley* v. *Holm*, 285 U.S. at 367; *Ex parte Yarbrough*, 110 U.S. 651 (1884). But the Framers clearly *denied* to Congress the power to establish additional qualifications (including term limits) for Representatives and Senators. In refuting the argument that the Congress might abuse its power under the Elections Clause to establish arbitrary qualifications for office, Hamilton thus relied squarely on the fact that the limited powers conferred by the Elections Clause did not include a power to set qualifications:

> Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

The Federalist No. 60, at 371.[13] By giving to Congress, through the back door of the Elections Clause, a power

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in that it requires civil servants to place the interest of their federal employment ahead of their political ambitions, for as long as they retain their civil service positions.

On the other hand, the courts have struck down provisions that disqualify state officials from running for federal office during the entire term to which they were appointed or elected, even if the state officeholder resigns to run. See *State ex rel. Johnson* v. *Crane*, 197 P.2d 864 (Wyo. 1948); *State ex rel. Chandler* v. *Howell*, 175 P. 569 (Wash. 1918). Because, in those cases, the candidate is disqualified for the entire term of state service, even if he or she resigns, such a bar exceeds the State's interest in regulating its own officeholders.

[13] There may be some question whether this remark by Hamilton was entirely accurate, in that the Convention may not have denied to Congress the power to alter the qualifications of *electors* in federal elections, only the qualifications of those who might be elected. See *Oregon* v. *Mitchell*, 400 U.S. 112, 122-123 (1970)

that the Convention denied to it through the Qualifications Clauses, petitioners' argument contravenes the Framers' design.

D. Amendment 73 Is Unconstitutional Even Though It Leaves Open The Theoretical Possibility Of Election By Write-in Vote

Petitioners contend that Amendment 73 is not a qualification because those excluded from the printed ballot are not absolutely prohibited, as a matter of law, from being elected; they retain the theoretical possibility of being elected by write-in vote. This argument ignores reality. The Court has recognized that exclusion from the ballot is, in all practical effect, exclusion from election. See *Anderson* v. *Celebrezze*, 460 U.S. at 799 n.26; *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974); *United States* v. *Classic*, 313 U.S. at 313; see also *McCarthy* v. *Briscoe*, 429 U.S. 1317, 1323 (1976) (Powell, J., in chambers); cf. *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968) ("The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."). "The Constitution requires that access to the electorate be real, not 'merely theoretical.'" *American Party of Texas* v. *White*, 415 U.S. 767, 783 (1974) (cita-

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(opinion of Black, J.) (suggesting Elections Clause gave Congress power to set voters' qualifications); cf. *id.* at 142-143 (opinion of Douglas, J.) (arguing that Fourteenth Amendment gave Congress power to regulate suffrage in federal elections); *id.* at 231 (opinion of Brennan, White, and Marshall, JJ.) (same). But even if Hamilton did misstate the Convention's position on the specific point of *electors'* qualifications, that does not cast doubt on this Court's holding in *Powell* that the Framers specifically deprived Congress of the power to add qualifications for service by *Members* beyond those established by Article I, Section 2, Clause 2, and Article I, Section 3, Clause 3. No analogous constitutional provision denies Congress the power to regulate the suffrage in federal elections. Petitioners' construction of the Elections Clause would eviscerate the holding of *Powell* by allowing Congress to enact legislation, pursuant to the Elections Clause, to exercise a power specifically denied it by the Framers.

tion omitted). As far as we are aware, only one Senator and four Representatives have been elected by write-in vote in this century. See J.A. 201-202.

Although petitioners recognize the near-impossibility of election by write-in vote, they argue that Amendment 73 does not impose an unconstitutional "qualification" because, in a few scattered instances, Amendment 73 may not have its intended effect of preventing the election of one who has previously served a certain number of terms.[14] Petitioners do not contest, however, that both the intended purpose and the virtually certain effect of Amendment 73 are to prevent the election of candidates who have served their "limit." While the technical terms of Amendment 73 were evidently designed to circumvent the restrictions on state power imposed by the Qualifications Clauses, the conclusion is "irresistible, tantamount for all practical purposes to a mathematical demonstration" (*Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960)), that it will have the same effect as an outright disqualification in almost every instance. Cf. *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939) (Fifteenth Amendment bars "onerous procedural requirements which effectively handicap exercise of the franchise * * * although the abstract right to vote may remain unrestricted"); *Guinn* v. *United States*, 238 U.S. 347, 365 (1915) (in case involving "grandfather clause" exemption from literacy test for suffrage, "we seek in vain for any ground which would sustain any other interpretation but that the provision[] recurr[ed] to the conditions existing before the Fifteenth Amendment was adopted").

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[14] Moreover, although Arkansas permits write-in voting, at least four States do not. See *Burdick* v. *Takushi*, 776 P.2d 824, 825 (Haw. 1989) (interpreting Hawaii election laws to prohibit write-in voting); *Chamberlin* v. *Wood*, 88 N.W. 109, 110-112 (S.D. 1901) (holding that write-in votes could not be counted under South Dakota's Australian ballot law (S.D. Codified Laws Ann. § 12-16-1 (Supp. 1994)); Nev. Rev. Stat. Ann. § 293.270(2) (Michie 1990); Okla. Stat. Ann. tit. 26, § 7-127 (West Supp. 1994). States are not constitutionally required to provide an opportunity for write-in voting. *Burdick* v. *Takushi*, 112 S. Ct. 2059 (1992).

To be sure, incumbents seeking reelection or those who have previously served in Congress are more likely to be known to voters than are other candidates. The disabilities imposed by write-in voting, however, are not limited to name recognition. Through a place on the ballot, a candidate demonstrates that he or she has "the requisite community support," *McCarthy* v. *Briscoe*, 429 U.S. at 1323 (Powell, J., in chambers), and is therefore a serious candidate for the office. Cf. *Lubin* v. *Panish*, 415 U.S. at 715 (noting legitimate state interest in "ballots * * * limited to serious candidates with some prospects of public support"). Ballot status may also demonstrate to the voters that the candidate has received the endorsement of, or at least substantial support from, the machinery of a political party, which can then be expected to cooperate with the candidate after the election to effectuate his or her program.[15] In addition, without a spot on the ballot, "[v]olunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign." *Anderson* v. *Celebrezze*, 460 U.S. at 792. Candidates forced to seek election through write-in votes are denied credibility in the voters' eyes, and by relegating a class of candidates to write-in status, Arkansas signals to its voters that a vote for those candidates is a throw-away vote.[16] In any case, the avowed purpose of Amendment

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[15] Indeed, Amendment 73 may impair the rights of political parties to advance the reelection of their incumbent officeholders. Cf. *Tashjian*, 479 U.S. at 221-222. If a party wished to support the reelection of an incumbent excluded from the ballot by Amendment 73, that provision would force the party to choose between (a) nominating no one for the general election ballot and relying on write-in votes, thus forfeiting its ballot position for that general election and perhaps also endangering its ballot position for elections in the future, and (b) nominating someone to hold a place on the ballot, but running the risk of splitting votes between the nominee on the ballot and the incumbent, the party's real choice.

[16] Two lower court decisions suggest that the ability to run a write-in campaign can be sufficient to turn what would otherwise

73 is to "limit the terms" of Arkansas Members of Congress, and that purpose, coupled with the likely effect in almost every election contest to which it would apply, is sufficient to establish its unconstitutionality.

Even if Amendment 73 could somehow be viewed as a procedural ballot-access provision rather than a qualification, it would nevertheless be unconstitutional because it is not rationally related to any legitimate state interest. The stated purpose of the Amendment is to prevent the election of candidates who, it is feared, will have the greatest support among the electorate. This is not "even[ing] out the playing field," as petitioner Bryant contends (Br. 26), but, rather, attempting to prevent a group of persons from playing at all.

To argue that Amendment 73 does not establish a qualification for office, petitioners are forced to concede that incumbents may be legitimately *elected*, notwithstanding Amendment 73, yet they wish to prevent that fact from being disclosed to the voters of Arkansas on the printed ballot. In this respect, the present case resembles the absentee ballot practice struck down in *American Party of Texas* v. *White*, 415 U.S. at 794-795. There, the Court held that Texas could not deny a position on the absentee ballot to candidates of parties that had qualified to appear on the general election ballot. Since there was no legitimate reason to deny absentee voters the opportunity to vote for candidates who had qualified for the ballot, the absentee ballot practice was struck down as "an arbitrary discrimination violative of the Equal Protection Clause." *Id.* at 795.

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be an impermissible "qualification" into a permissible "ballot-access restriction." *Hopfmann* v. *Connolly*, 746 F.2d 97, 102-103 (1st Cir. 1984); vacated on other grounds, 471 U.S. 459 (1985) (per curiam); *Public Citizen, Inc.* v. *Miller*, 813 F. Supp. 821, 831-833 (N.D. Ga.), aff'd mem., 992 F.2d 1548 (11th Cir. 1993). Both cases, however, involved procedural election regulations, and the discussion of write-in voting was unnecessary to the decisions.

In the present case, petitioners concede that incumbent officeholders may be qualified to be reelected, yet the purpose of Amendment 73 is to keep that information from the voters. If so, the Amendment is aimed, not at preventing "the clogging of [the ballot to] avoid voter confusion," *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972), but at creating voter confusion by misleading voters as to the identity of legitimate candidates. Nor could Amendment 73 be upheld as an effort to "assume that the winner is the choice of a majority, or at least a strong plurality, of those voting," *ibid.*, since the likely and intended effect of the Amendment would be to prevent the election of candidates with substantial support. There is no basis for holding that fostering voter confusion about the identity of legitimate candidates or preventing the election of popular ones is a permissible state objective.

E. The Tenth Amendment Does Not Sustain The Validity Of Amendment 73

Finally, petitioners contend that Amendment 73 is a legitimate exercise of power traditionally exercised by the States, and reserved to the States by the Tenth Amendment. The Tenth Amendment, however, provides that "powers *not* * * * *prohibited* by [the Constitution] to the States, are reserved to the States." (Emphasis added.) Because the Qualifications Clauses prohibit both Congress and the States from adding qualifications to service in Congress, the Tenth Amendment has no application here.

In addition, it is doubtful that state power over federal elections was considered by the Framers to be among the sovereign powers "reserved" to the States by the plan of the Convention and the Tenth Amendment. The federal Congress did not exist before the Constitution, and the authority of the States to regulate federal elections to the Congress stems from the power delegated to the States by the Constitution itself, in the Elections Clause, and not from their previous existence as otherwise sovereign

entities. Cf. *Hawke* v. *Smith*, 253 U.S. 221, 230 (1920) (state authority to ratify constitutional amendments "has its source in the Federal Constitution" and not the general reserved powers of the States). As this Court has noted, "[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I." *United States* v. *Classic*, 313 U.S. at 315 (citations omitted). The Tenth Amendment therefore could not "reserve" to the States the power to regulate elections to the new federal legislature.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted.

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